

SERVED: April 28, 1993

NTSB Order No. EA-3867

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 14th day of April, 1993

_____)	
JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-10637
v.)	
)	
WILLIAM J. DIBIASIO,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge William E. Fowler, Jr. at the conclusion of an evidentiary hearing held in this matter on March 12, 1991.¹ In that decision, the law judge affirmed the Administrator's order suspending respondent's airline transport pilot certificate for 60 days based on his unauthorized operation

¹ Attached is an excerpt from the hearing transcript containing the oral initial decision.

of a Cessna 150L within the Airport Traffic Area (ATA) surrounding T.F. Green Airport, Providence, Rhode Island, and within the Providence airport radar service area (ARSA), in violation of 14 C.F.R. 91.85(b), 91.88(c) and 91.9.²

On appeal, respondent argues that the Administrator's witnesses lack credibility and that the evidence does not establish that his aircraft was within the ATA or the ARSA.³

² Section 91.85(b) [now recodified as 91.127(c)] provided, in pertinent part:

§ 91.85 Operating on or in the vicinity of an airport; General rules

(b) Unless otherwise authorized or required by ATC, no person may operate an aircraft within an airport traffic area except for the purpose of landing at, or taking off from, an airport within that area.

Section 91.88(c) [now recodified as 91.130(c)] provided:

§ 91.88 Airport radar service areas.

(c) **Arrivals and Overflights.** No person may operate an aircraft in an airport radar service area unless two-way radio communication is established with ATC prior to entering the area and is thereafter maintained with ATC while within that area.

Section 91.9 [now recodified as § 91.13(a)] provided:

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³ Respondent incorrectly assumes that the Administrator was required to prove those violations "beyond a reasonable doubt." (App. Br. at 8.) The Administrator is only required to establish his case by a preponderance of the reliable, probative, and substantial evidence. 49 C.F.R. 821.49(a).

Respondent maintains that his aircraft never descended below the upper limit of the ARSA (4,100 feet MSL), and suggests that the aircraft which was observed and tracked by radar through the ATA and the ARSA was another aircraft. He asserts that, in any event, he did not violate section 91.9 since there were no other aircraft in the area. Respondent also asserts, without citation or elaboration, that the sanction is not consistent with precedent or with "recent directives of the Administrator." (App. Br. at 8.) The Administrator has filed a reply brief opposing the appeal.

Upon review of the briefs and the entire record in this case, we conclude that respondent has shown no error in the initial decision. Accordingly, his appeal is denied and the initial decision is affirmed.

There is ample evidence in the record to support the law judge's findings that respondent's aircraft was within the ATA and the ARSA.⁴ Radar controller Andrew Dole, who was working approach control at the Quonset TRACON, testified that a tower controller reported an unauthorized aircraft sighted 3-4 miles

⁴ As defined in 14 C.F.R. 1.1, the ATA is that airspace within a horizontal radius of five statute miles from the geographical center of any airport at which a control tower is operating, extending from the surface up to, but not including, an altitude of 3,000 feet above the elevation of the airport. Because the airport in this case is 56 feet above sea level (see Exhibit R-2), the ATA extended up to 3,056 feet MSL.

According to air traffic controller Andrew Dole, the upper limit of the Providence ARSA, which covers a ten-mile radius around the airport, is at 4,100 feet MSL. (Tr. 31-2, 144-5.) The lower limit, which varies in different portions of the ARSA, is of no consequence to the violations in this case.

from the airport at 3,000 feet. (Tr. 13-4.) The transcript of relevant air traffic control (ATC) transmissions, coupled with the automatic radar terminal system (ARTS) chart depicting the movements of the unauthorized aircraft, confirms that at the time the aircraft was sighted at 3,000 feet it was well within the five-mile radius that defines the ATA. (See Exhibits A-3 and A-6.) David Thomas, a traffic reporter flying in the area at the time of the incursion, testified that after being warned of the aircraft by ATC, he spotted it maneuvering in the ATA.⁵ (Tr. 66-7, 32.) With ATC approval, he followed the offending aircraft, which began to climb, and ultimately identified it at 3,800 feet as the aircraft piloted by respondent. (Tr. 27, 71, 76, 80-1, 92.)

While it appears from the ARTS plot of the offending aircraft's movements that at the time of Mr. Thomas' identification it may no longer have been within the confines of the ARSA, it is abundantly clear from that same diagram that the aircraft was operating well within the confines of both the ATA and the ARSA immediately before the identification. (See Exhibits A-3 and A-6.) Mr. Thomas testified that he kept the offending aircraft in sight as he pursued it, and that he did not recall any other aircraft in the area at the time. (Tr. 73, 75,

⁵ The traffic reporter's written statement indicates that he and the other aircraft were both at 2,900 feet when he first saw it within the ATA. (Exhibit A-5.) He testified that he was sure the other aircraft was within the ATA because he knew from landmarks below that he himself was only four miles north of the airport, and in relation to his aircraft the other aircraft was even closer. (Tr. 80.)

93.) Controller Dole confirmed that there were no other aircraft in the vicinity at the time, and that he observed Mr. Thomas' aircraft following and converging with the path of the offending aircraft on his radar scope. (Tr. 12-3, 20-1, 55, 93.)

We are convinced that the preponderance of the evidence supports the law judge's finding that the aircraft which ATC and Mr. Thomas observed in the ATA and the ARSA was the same aircraft Mr. Thomas intercepted and identified as the one flown by respondent.⁶ Respondent has shown no arbitrariness or capriciousness in the law judge's credibility determinations in favor of the testimony of controller Dole and Mr. Thomas. Accordingly, we will not disturb those findings. Administrator v. Smith, 5 NTSB 1560 at 8 (1986).

It is undisputed that respondent failed to communicate with ATC before or during his operation within the ATA and the ARSA, and that he was neither landing at nor taking off from T.F. Green Airport. Accordingly, his operation was in violation of sections 91.85(b) and 91.88(c). These violations, without more, are sufficient to support a residual violation of 91.9. See Administrator v. Johnson, NTSB Order No. EA-3796 at 6, n. 5 (1993), and cases cited therein. On the issue of sanction,

⁶ Respondent admits that his was the aircraft intercepted by Mr. Thomas at 3,800 feet, but insisted at the hearing that he was not the one Mr. Thomas was following within the ATA and ARSA, suggesting that Mr. Thomas must have "lost track" of the aircraft he was following. (Tr. 221, 226, 251.) With regard to the incriminating radar plot, respondent postulated that his aircraft and the offending aircraft must have passed close to each other at some point after the ARSA incursion, somehow causing their targets to "merge" on the radar scope. (Tr. 252-3.)

respondent has shown no reason why the 60-day suspension of his certificate ordered by the law judge should not be affirmed for these three violations.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 60-day suspension of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.⁷

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁷ For the purpose of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).